

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

—
No. 10508
—

WILLIAM R. MACILRATH, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*.

—
Appeal from the United States District Court for the
District of Columbia.

—
*United States Court of Appeals
For the
District of Columbia Circuit*

FILED DEC 16 1950

Joseph W. Stewart

CLERK

JAMES J. LAUGHLIN,
National Press Building,
Washington, D. C.,
Counsel for Appellant.

QUESTION PRESENTED.

Whether in a trial for assault with a dangerous weapon there is a duty on the part of the trial judge, on his own motion, to instruct on simple assault if there is evidence in the record to support such an instruction.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10,508.

WILLIAM R. MACILRATH, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

BRIEF ON BEHALF OF APPELLANT.

JURISDICTIONAL STATEMENT.

This appeal is taken from judgment of the United States District Court for the District of Columbia sentencing appellant to prison for a term of four to twelve years after conviction. Appellant was indicted on a three count indictment, each count charging assault with a dangerous weapon. He was sentenced January 6, 1950. Notice of

appeal was timely filed and various extensions of time were granted by the United States District Court for the District of Columbia within which to file the record on appeal. The record was filed October 9, 1950.

STATEMENT OF THE CASE.

Appellant was tried in the court below on a three count indictment. The first count charged that on or about July 2, 1949 he made an assault with a dangerous weapon on Joseph M. Sosa. The second count charged that on the same day he made an assault on Mary K. Sosa, wife of Joseph M. Sosa. The third count charged that on the same day he made an assault with a dangerous weapon on Sarah J. Hawkins. In connection with the third count it should be pointed out that a pistol was used as a club.

The evidence showed that since November, 1944 appellant resided at 460A H Street, S. W. He occupied the entire second floor. There roomed (or sub-rented) at the same address a Mr. and Mrs. Sosa. A dispute arose as to the payment of rent. There was testimony to the effect that a complaint had been made to the Administrator of Rent Control. Appellant contended that Mr. and Mrs. Sosa were attempting to move from the premises without paying rent due appellant. Appellant made a visit to No. 4 Police Precinct in an effort to obtain the assistance of police officers. He was told at the Precinct that there was nothing that could be done for him inasmuch as it was a civil matter.

When the appellant returned to his premises he found that Mr. and Mrs. Sosa, and the sister-in-law of Mrs. Sosa, Sarah J. Hawkins, were in the process of moving from the premises. The Government contended that appellant approached Mary Sosa with a loaded pistol and there was evidence that Mary Sosa screamed. Thereupon the husband, Joseph Sosa and Sarah Hawkins ran from the room into the hallway and the appellant shot at Joseph Sosa with his gun, and one of the bullets struck him in the chest. The

testimony was that there was a general encounter and that the appellant struck Mrs. Sosa and Sarah Hawkins in the head with the pistol held in his hand.

The appellant testified that Mr. and Mrs. Sosa rented a kitchen and one large room, and it was later developed that they brought with them three children. There was testimony that there was some dispute over the children running about the premises and later Sosa complained to the Administrator of Rent Control (Tr. 148). Appellant testified that the Sosas later became in arrears in rent in the amount of \$108.00. Appellant testified that when he asked the Sosas to pay the rent that they stated to him rather abruptly that they did not intend to pay.

Appellant stated that on July 2, 1949 he saw Mr. Sosa removing certain furniture from the premises (Tr. 150) and he then went to the police station for advice. Appellant testified that he wanted one of the police officers to return with him to the premises inasmuch as he expected trouble from the Sosas. He stated that the police refused to assist him. He stated that on his way back to the premises he looked for officers but was unable to find one. Appellant testified that when he returned to the premises he got his gun and put it in a holster and had it on his person. Appellant's testimony was to the effect that he was fearful that Mr. Sosa would attack him with a knife.

Appellant testified that he asked Sosa for the payment of the rent and that Sosa replied "I am not going to pay you", and then made his way to the truck in the process of moving the furniture from the premises (Tr. 155). Appellant testified that he asked Sosa "Where are you moving to so I can get in contact with you?" (Tr. 156) and Sosa replied "It is none of your damned business." Appellant testified that Sosa charged him with a bed rail and then began to use insulting and threatening language to him. Appellant testified that as Sosa was waving the iron bar in a menacing manner he drew his gun (Tr. 157). He testified further that the two women grabbed him, one on

each side, and that there was a struggle over the pistol. Appellant testified that two shots were fired and then Sosa dropped the iron bar. He swore that at no time did he aim the gun at Sosa (Tr. 158), but that Sosa seized his wrist and hands and tried to take the gun from him.

Appellant testified that after the gun was discharged the women clung to him and were choking him; that they had their arms around his neck and began to scream; and that he struck them with the barrel of the gun to free himself. Appellant testified that he said "Let me go" and that they refused, and it was at that time that he struck them three or four times with the gun.

Appellant was convicted on all three counts and was sentenced to serve four to twelve years in prison. He is presently confined in the D. C. Reformatory at Lorton, Virginia.

STATUTES INVOLVED.

Section 502, Title 22, D. C. Code, 1940 Edition, reads:

"Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years."

Section 503, Title 22, D. C. Code, 1940 Edition, reads:

"Whoever assaults another with intent to commit any other offense which may be punished by imprisonment in the penitentiary shall be imprisoned not more than five years."

Section 504, Title 22, D. C. Code, 1940 Edition, reads:

"Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both."

Rule 31(c), Federal Rules of Criminal Procedure provides as follows:

“Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.”

STATEMENT OF POINTS.

Only one point is involved in this appeal. The trial judge was in error in refusing to instruct on the various grades of assault, as required by the Rules of Criminal Procedure.

SUMMARY OF ARGUMENT.

Rule 31(c), Federal Rules of Criminal Procedure makes it mandatory on the trial judge to fully instruct the jury on all offenses necessarily included in the offense charged in the indictment, provided there is evidence to justify such an instruction.

ARGUMENT.

In the present case, the indictment charged the following:

First count. “That on or about July 2, 1949, within the District of Columbia, William R. MacIlrath made an assault with a dangerous weapon on Joseph M. Sosa, to wit, with a loaded pistol.”

Second count. “That on or about July 2, 1949, within the District of Columbia, William R. MacIlrath made an assault on Mary K. Sosa, with a dangerous weapon, to wit, a pistol used as a club.”

Third count. “That on or about July 2, 1949, within the District of Columbia, William R. MacIlrath made an assault on Sarah J. Hawkins, with a dangerous weapon, that is to say, a pistol used as a club.”

The transcript of proceedings in this case shows plainly that the testimony of the appellant, if believed (Tr. 156-161), would fully justify a verdict of “assault with intent to commit any other offense” (Sec. 503, Title 22, D. C. Code) or “threatening another in a menacing manner”

(Sec. 504, Title 22, D. C. Code). The trial judge, in his charge to the jury stated the law thus:

"The first count charges that the defendant, on or about July 2, 1949, made an assault on Joseph M. Sosa with a dangerous weapon, that is to say, a loaded pistol.

The second count charges that on July 2, the defendant made an assault on Mary K. Sosa, with a dangerous weapon, that is to say, a pistol used as a club.

The third count of the indictment charges that the defendant on July 2, made an assault on Sarah J. Hawkins, with a dangerous weapon, that is to say, a pistol used as a club.

The indictment is returned under that section of the District of Columbia Code which very simply says that any person who commits an assault with a dangerous weapon shall be guilty of a crime.

An assault consists in an unlawful offer or attempt with force or violence to do bodily harm to another.

A dangerous weapon is any weapon which is capable of inflicting serious injury." (Tr. 244-245)

The judge very carefully instructed the jury on the law of self defense; also on the proposition as to whether the gun was discharged accidentally. It is conceded that no request was made of the trial judge to instruct on other degrees of the offense or offenses included within the offense charged. However it is our position that it is mandatory on the trial judge, even without a request, to comply with the provisions of Rule 31(c), Federal Rules of Criminal Procedure. In this case that was not done and we say, therefore, that this constituted fatal error and the judgment of the court below should be reversed.

In this connection we desire to cite the case of *Burcham v. U. S.*, 82 U. S. App. D. C. 283; 163 F. (2d) 761. In that case the court said:

"While it is true, as appellant asserts, that a defendant may be found guilty of any offense necessarily included in the crime charged in the indictment, Title 18, #565, U. S. C. A., it is also true that an instruction on a lesser included offense should not be given unless

there is evidence to justify it. Here the testimony was of an assault with a dangerous weapon, which Burcham did not deny. There was no basis for an instruction on simple assault."

The instant case is distinguishable from the Burcham case. The appellant herein took the stand and denied the charge laid in the indictment and his story, if believed, fully justified the instruction as required by Rule 31(c), Federal Rules of Criminal Procedure.

CONCLUSION.

In view of the above we say the judgment of the lower court was error and should be reversed.

JAMES J. LAUGHLIN,
National Press Building,
Counsel for Appellant.

APPENDIX

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10,508.

WILLIAM R. MACILRATH, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

**Appeal from the United States District Court for the
District of Columbia.**

APPENDIX.

A

Filed Jan 16 1950

**Form of Clerk's Statement of Docket Entries to be
Forwarded Under Rule IV.**

(To accompany duplicate notice of appeal to the United
States Circuit Court of Appeal)

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

WILLIAM R. MACILRATH

1. Indictment for Assault With a Dangerous Weapon,
filed 8/22/1949.
2. Arraignment 8/25/1949.
3. Plea to indictment Mpt guilty 8/25/1949.
4. Motion to withdraw of guilty denied.....
5. Trial by jury, 11/30/1949.
6. Verdict or finding of guilt, Guilty as indicted, 12/1/
1949.
7. Judgment—(with terms of sentence) 3 to 9 years on
count one; 1 to 3 years on count two; to run consecutively
with sentence in count one; 1 to 3 years on count three to
run concurrently with count two.

TAMM, J.

Entered January 6, 1950.

8. Notice of appeal filed January 16, 1950.

Date January 16, 1950.

Attest HARRY M. HULL

Clerk.

By: MARGARET L. BOSWELL

Deputy Clerk.

• • • • •

B

Filed January 16, 1950

Criminal No. 1143-49

Notice of Appeal.

Name and address of appellant: William R. MacIlrath,
Washington Asylum & Jail, 200 19th St., S. E.

Name and address of appellant's attorney: James J.
Laughlin, National Press Building.

Offense: Assault with deadly weapon.

Concise statement of judgment or order, and date of sen-
tence: 4 to 12 years, January 6, 1950.

Appellant hereby appeals to the United States Court of
Appeals for the District of Columbia Circuit from the
above-stated judgment.

JAMES J. LAUGHLIN,
National Press Building,
Counsel for Defendant.

* * * * *

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Filed in Open Court Aug 22 1949

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

July Term, 1949

Criminal No. 1143-49

Grand Jury No. 857-49

Assault With a Dangerous Weapon
(22-502 D. C. Code)

THE UNITED STATES OF AMERICA

v.

WILLIAM R. MACILRATH

Indictment.

The Grand Jury charges:

On or about July 2, 1949, within the District of Columbia, William R. MacIlrath made an assault on Joseph M. Sosa with a dangerous weapon, that is to say, a loaded pistol.

SECOND COUNT:

On or about July 2, 1949, within the District of Columbia, William R. MacIlrath made an assault on Mary K. Sosa with a dangerous weapon, that is to say, a pistol used as a club.

THIRD COUNT:

On or about July 2, 1949, within the District of Columbia, William R. MacIlrath made an assault on Sara J. Hawkins with a dangerous weapon, that is to say, a pistol used as a club.

GEORGE MORRIS FAY

*Attorney of the United States
in and for the District of Columbia*

A TRUE BILL:

HENRY N. BLISS

Foreman

* * * * *

Excerpts from Testimony & Proceedings.

11 **Joseph Sosa** was called as a witness for and on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bacon:

* * * * *

15 Q. Did you have any conversation with him then?

A. No, sir.

Q. What did you do immediately after that? A. Well, I walked up the stairs to keep on bringing—to go after my belongings.

Q. Where did you go when you came in the house? A. When I was walking, I was walking up the steps when Mr. MacIlrath came up to me and he started cussing a lot of bad words, which I don't think is proper to say here.

Q. Tell us what he said after that. A. So my sister-in-law told me, she was—

Q. No, no. Was Mr. MacIlrath there at that time? A. Yes, he was there in the hall.

Q. All right. Tell us what happened there in the hallway at that time. A. Well, my sister pushed me and she said, "Don't pay any attention to him, because this is your last day here, and we don't want any trouble," so I went to the first room to get some of my belongings, because we had two rooms.

Q. How long did you stay in that room? A. I was just there for a few seconds when I heard my wife scream.

Q. What did she scream? A. My wife screamed, she said, "Not with a gun, Mac, Not with a gun."

16 Q. Then what did you do? A. So naturally I walked out to find what was going on.

Q. What did you see when you came out of the room? A. I saw that my wife was trying to hold the gun from Mr. MacIlrath with her left hand, and she had her right hand on Mr. MacIlrath's chest.

Well, Mr. MacIlrath pushed my wife, and after he pushed her, he hit her with the gun some place on the head up here (indicating), and then I saw the blood coming on my wife's head.

Q. What did you do then? A. I stopped for a second, because, well, I thought my wife was going to fall, and then there was a shot.

I thought my wife was the one being shot, and then when I heard that shot, then I kept on running towards Mr. MacIlrath because I wanted to grab the gun from him, and then there was another shot, and that shot hit me in my chest here (indicating), and it came out here in my back (indicating).

Q. Now, what happened the moment you were shot? A. When I got shot, the impact swung me about half a circle, and then when I turned around, I saw my sister-in-law coming down the hall, too.

I said, "Honey, I have been shot."

17 So I turned around again to face Mr. MacIlrath, and then I saw Mr. MacIlrath pointing the gun at my face. I tried to reach him, but I couldn't because I was, well, like a distance from here to where the gentleman is sitting, and I couldn't reach his gun, and then my sister-in-law said, "That's enough, you coward," she said, "You already shot him."

And then she ran in front of me and she held Mr. MacIlrath's hands with both of her hands, where Mr. MacIlrath had the gun, and she pinned him to the wall, and then my sister-in-law said, "Go away, Joe, go away," so I walked down the steps and I was going about three steps,

I walked about three steps, when I heard another shot. I turned around to see if anybody was shot, but I didn't see anybody fall, so I took for granted that nobody was hurt.

Then I kept on walking.

Q. And how far did you get? A. I walked way down to the sidewalk.

Q. And what happened? A. I went to the garage, which was just a few yards from our place, and I called for help.

Q. Were you taken to the hospital? A. Yes, sir, I was taken to the hospital.

Q. How long were you in the hospital? A. I was up there for about sixteen days, I guess it was.

Mr. Bacon. No further questions.

* * * * *

58 **Mary Jeanette Sosa** was called as a witness for and on behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bacon:

* * * * *

62 Q. Did you say anything to him at that time, other than scream? A. No.

Q. And when he pulled the gun out, what did he do with the gun? A. Well, he just pulled it out and held it, and I started to reach for it—

Q. When you say that he held it, do you mean he pointed it at something? A. He was pointing it at me.

Q. What did you do? A. Well, then I screamed, and I started to grab for the gun, and he give me a push and he hit me with the gun.

Q. Did you grab for the gun? A. I started to grab it, yes.

Q. Do you recall which hand the gun was in? A. Well, it was his right hand.

Q. Now, when you grabbed for the gun, what did he do with that right hand? A. He took it, he still had the gun

and he pushed me with the other one, and then he took the gun and hit me over the head.

* * * * *

144 **William R. MacIlrath**, the defendant, was called as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lindas:

Q. Will you state your full name, please? A. William Roy MacIlrath.

Q. Where do you live, Mr. MacIlrath? A. 460-A H Street, Southwest.

Q. How long have you lived there? A. Since November, 1944.

Q. How long have you lived in the city of Washington? A. Since 1940.

Q. Are you employed at the present time? A. 145 No.

Q. Have you ever been employed in Washington? A. Yes, I was.

Q. For whom have you worked? A. I worked at Doctors Hospital and I worked for the Capital Transit Company.

Q. Worked for whom? A. Capital Transit Company.

Q. How long did you work for the Capital Transit Company? A. About just a little short of six years.

Q. What kind of work were you doing for them? A. I was guard.

Q. Mr. MacIlrath, what portion of the building at 460 H Street, Southwest, do you occupy? A. Well, I occupied one room.

Q. On what floor? A. Second floor.

Q. Do you have an apartment on the second floor besides the one occupied by you? A. Yes, sir; I have the whole second floor.

Q. Now, when did you first meet Mr. Sosa? A. I met Mr. Sosa about the end of the hot weather in 1948. I don't remember just what week or month.

Q. What occurred after you met him? A. Well,
146 he rented an apartment from me.

Q. Now, after you met Mr. Sosa, do you recall who it was moved into the apartment? A. Well, Mr. Sosa and his common-law wife moved in first, and they told me they just wanted the back end, that is, the kitchen and one large room, and that was all I knew there was going to be to it at the time. And he then introduced the idea that they had one baby that they would like to have visit its mother, and I certainly could not object to having the baby come over, and finally they brought the baby over to stay. They asked me if they could let the baby stay there and I thought the proper place for a baby was with its mother, so I let the baby stay there.

Q. Well, how many people eventually moved into the apartment to live there? A. Well, they ultimately got the whole family in, by quite a little bit of shenanigan.

The Court. Just answer the question.

By Mr. Lindas:

Q. How many people moved into the apartment? A. Mr. Sosa and Mary, and three children, moved in.

Q. And did they occupy the apartment from the time they rented it until they moved in July? A. That is right.

Q. The number of people you have mentioned? A.
147 That is right.

Q. Was that apartment furnished or unfurnished? A. It was furnished.

Q. How was it furnished? A. Well, just about like a middle-class place would be.

Q. When he moved in, did he bring anything with him? Did he move anything in the apartment? A. Practically nothing. He might have had a few little do-dads, but

nothing to amount to anything. He had a couple or three electric fans, I think, small ones, and a few things like that.

Q. After he rented the apartment and moved into it, did you have any difficulty with him? A. Well, it started almost at once after he got the whole family in there.

Q. What were those difficulties? What occurred? A. Well, in the first place, he got two more children in, with quite a little bit of shenanigan.

The Court: I will not caution the defendant again on that type of testimony. I will hold his counsel responsible for proper testimony.

Mr. Lindas. Well, I don't want him to do that. I am trying to get him to answer just my questions.

148 By Mr. Lindas:

Q. Just state what it was that happened. A. Well, I will have to put that in a little different words, I guess.

Q. I am asking you whether or not you had any difficulties with Mr. Sosa after he moved in. A. Oh, yes, almost at once.

Q. What were the difficulties? A. Concerning the rent, for one thing.

Q. What was the difficulty that you had? A. Well, Sosa went to the Rent Control Board and reported me to the Rent Control Board. He figured he was paying too much rent, and he went to the Rent Control Board about it.

Q. Well, did he keep on paying his rent the entire time he was there? A. He fell into arrears and stayed about a month or six weeks in arrears all the way through.

Q. How much rent did he owe when he left your place? A. They owed \$108.

Q. Before he left, did you have any discussion with him in respect to the payment of this back rent? A. You mean that particular morning when he left?

Q. No. I mean before that particular morning, at
149 any time. A. Oh, we had frequent brief discussions; yes.

Q. Did you ever go to his apartment to discuss this matter with him? A. Well, I have talked to him some in his own apartment and some in mine.

Q. Well, immediately before this happened, did you have any difficulty with him in his apartment, or at his apartment? A. Well, on the Sunday preceding the day that they moved, on Saturday—

Q. What was that difficulty? A. I went in to ask him if he would pay me some rent. He was five weeks in arrears at that time. And he drove me out of the apartment and acted very violently and slammed the door and refused to pay it.

Q. At that particular time did he say anything to you? A. Told me to get out, very violently, and slammed the door.

Q. Were there any threats made at that time?

Mr. Bacon: I object. He is leading, your Honor.

The Witness: Nothing except the general attitude of the man.

By Mr. Lindas:

Q. How often were you in the apartment from the
150 time he rented it up until the time he moved? A. I would say altogether he was there about ten months.

Q. Beg pardon? A. About ten months altogether.

Q. About ten times? A. Ten months that he lived in the apartment.

Q. I am asking you were you ever in his apartment while he lived there. A. Oh, I was in there several times; yes.

Q. Did you see any weapons in there when you were in there? A. I certainly did.

Q. What did you see? A. I saw a machete and a sheath knife.

Q. Where were they? A. Well, they lay around one place—they wouldn't always be in the exact same place every day that I saw them.

Q. Directing your attention to the morning of July 2, what happened on that morning? A. Well, I got up and was drinking coffee and the door was open, and I saw Mr. Sosa go by carrying a bed, one of those small folding beds, the first thing that I saw, and I knew he was moving or suspected that he was, unless he was just carrying it out for some purpose, and I watched to see if anything more
 151 went by the door, and it started going by in a stream.

He hadn't told me that he was going to move. He was moving out, and it was obvious he was moving out, so I sat there and studied and drank coffee, wondering what to do about it.

Q. Well, what did you do finally? A. Well, I finally decided the best thing I had better do, I knew it was dangerous to talk to him—

Q. No; what did you do? A. I went to a police station.

Q. Did you talk to him before you went to the police station? A. No, I didn't say a word to him.

Q. Now, to what police station did you go? A. I went to No. 4.

Q. And when you got there, with whom did you talk? A. Well, I talked to the desk sergeant.

Q. Is that the man who testified here? A. Yes, sir.

Q. What was it you said to him? A. Well, I told him that the folks were moving out down there, renters were moving out, moving very fast, and had the truck in front and was loading it fast, and that I was afraid to talk to this man, Mr. Sosa; I was afraid I would precipitate a
 152 fight, because it was a hot situation, and that I wanted an officer to go down there and stand by my side while I talked to Mr. Sosa. I didn't want the police to collect any rent or to stop the moving or to do anything of that kind. I didn't ask for that.

Q. Now, what did they say? A. And this officer on the desk seemed to be kind of thick-headed or something.

Q. No. What did he say? A. He said, "I will send you a man down after a while."

Q. All right. And then was there anything else said?

A. Well, he went and called on the phone, and he acted in a kind of enigmatic manner. I couldn't tell what—

Mr. Bacon: I object to his testifying in what manner the officer acted, your Honor. That is his opinion, as to how the officer acted.

The Court: The objection is sustained.

By Mr. Lindas:

Q. Just simply tell what the man said. What did he say?

A. Well, all he told me was that he would send me a man down there after a while.

Q. After he said that, then what did you do? A. Well, I protested that this was a hot situation, that I would like to have an officer go down there with me to prevent a
153 fight, or to stop a fight before it started. I very definitely mentioned a fight, and I mentioned stopping it before it started.

Q. Well, after all that was done, what did you do? A. Well, in the meantime another officer came in and stood around quite a while, and he didn't assign him to go with me. I didn't see any reason why he could not, but he did stand there, and then I just gave it up.

I said, "I will just have to do something myself."

Q. No. What did you do when you found out that they wouldn't send anybody with you? What did you do? A. I went back home.

Q. Well, did you do anything else while you were on your way home? A. I looked for officers along the street. I was intending to pick one up, a patrol car, or anyone, to go with me, so that I could talk to Mr. Sosa without having any trouble. I didn't want any trouble.

Q. Were you able to find any officer? A. I couldn't find one; no.

Q. When you got to the house, what was going on when you got there? A. They were still moving.

Q. What did you do then? A. I went on up to my room and I studied how to handle the situation inasmuch as I couldn't get any police support.

154 Q. Well, what did you do? A. I went in and studied what to do, and then I got my gun. I slipped it on a shoulder holster under a sport shirt.

Q. Why did you do that? A. Well, because I knew or suspected I would be very suddenly attacked, possibly with a machete and sheath knife, and I was looking for that kind of an attack, and I wanted to stop the man. I decided the gun would stop the man.

Q. After you did that, what did you do? A. I walked out into the hall and I said, "Joe, you are moving?"

Q. Wait a minute. You walked out into the hall? When you walked out in the hall, who was there? A. Well, Sosa and his two women were moving the stuff out, passing along in front.

Q. Were the three of them out there together? A. Well, they were not together. They were all carrying stuff down to the truck.

Q. I mean, were they all in the hall at the same time that you came out? A. No. They might maybe on one or two trips, they might maybe have been, and most of the time maybe they were not.

Q. I mean when you came out in the hall, for how long a period of time did you stay outside your door before you saw anyone, and who did you see? A. Well, I saw them passing along, they passed in front of me, back and forth, back and forth, and I didn't say anything for quite a while.

Q. Well, when the time came that you did see someone, to whom did you speak. A. I spoke to Mr. Sosa.

Q. And when you spoke to him, was there anyone else there with him? A. No, there was no one right there with him.

Q. What was it that passed between the two of you? What did you say and what did he say? A. Well, I said, "Joe, you are moving, are you?"

And he intimated—he was not much of a man to talk; he kind of shook his head and intimated he was moving, and so then I knew there was no use to ask for the rent.

Q. No. What did you say and what did he say? A. Well, he went on down and came back a trip or two, and I just stood there and watched the moving going on, and finally I asked Joe, I says, “Are you going to pay me now or after a while?”

He says, “I am not going to pay you,” and then he made another trip out to the truck and he murmured something about the Rent Control Board when he came back in.

I didn’t understand just exactly what he did say.

156 Well, I says, “Where are you moving to, so I can get in contact with you?”

I mean, you know, to go to Court.

And he said, “It is none of your damned business.”

He was going to conceal the fact of where he was moving to from me, and did do it. I never knew where he went or was going to until I got down to central police station.

Mr. Bacon: Your Honor, I object to this.

The Court: Objection sustained.

By Mr. Lindas:

Q. Did a time come when you had a further conversation with Mr. Sosa in the hall? A. There was very little conversation. That was about the extent of the conversation that morning.

Q. When, then, did this final difficulty start? A. The final difficulty started when Sosa charged out of his room like a Jap soldier with that bed rail.

Q. Was anything said just before that happened? A. Well, I called him several varieties of rat and told him he was being unfair and so on, and he was acting in a very contemptuous manner, moving out and not telling me where he was going, and beating me out of \$106 of rent, or \$108 of rent.

Q. When you say he came charging out with a bar, is this the one that you referred to (indicating)?
 157 A. That is it.

Q. Now, when he came charging out with that particular bar, how was he holding it? A. Well, he was waving it over his head more or less like a soldier charging with a bayonet.

Q. Where were the women folks at that time? A. Right at my elbow.

Q. Beg pardon? A. Right at my elbow—on each side.

Q. Then what did you do when he came towards you with this iron? A. Well, I didn't have much time to do anything.

Q. What did you do? A. I drew the gun when he got about as far as from here to that gentleman there (indicating).

Q. Where were you standing at the time you drew the gun? A. Right in front of my door.

Q. Was your door opened or closed? A. It was open.

Q. And after you drew the gun, then what happened?
 A. Well, the women grabbed me instantly.

Q. Where did they grab you? A. One on each side.

158 Q. And what did they grab? A. Well, they grabbed my arms, grabbed all parts of my body, and grabbed at the gun, and I was trying to keep the gun away from them.

Q. Where was Sosa at that time? A. Where was Sosa?

Q. Yes. A. He was down the hall about ten feet, I would say.

Q. Well, what did he do when the women grabbed you?
 A. Well, he finally dropped his bar after the two shots had been discharged off, and came on in and joined the women in the scuffle.

Q. Now, were the shots discharged before he came up?
 A. Two of them were; yes, sir.

Q. How long a period of time elapsed from the time you pulled your gun before the shots were fired? A. I would

say five seconds, perhaps, or less than that. About two seconds, the first shot went off.

Q. And in what direction were those shots fired? A. Right straight across from my open door into the wall.

Q. At any time was the gun aimed at Sosa? A. It was not.

Q. After he came up, then what did he do? A. He seized my wrist and hands and tried to take the gun away from me.

159 Q. Which way were you facing at that time? A. Just about straight across the hall.

Q. Where was he in reference to your door and the wall? A. Well, he was right in front of my door, and between me and the wall.

Q. Was he between you and the wall? A. He was.

Q. How much time elapsed between the time he grabbed your hands before another shot was fired? A. Well, I will say maybe five or ten seconds. It was very fast. The while action was very fast.

Q. And at the time the third shot was fired, did all three of them have ahold of you? A. They certainly did.

Q. Now, did you know that you had shot Mr. Sosa? A. Well, I suspected that he had contacted the third shot, because—

Q. I say, did you know that you had shot him? A. No, not positively. No.

Q. And after the third shot was fired, what happened? A. He ran down the stairs at high speed.

Q. What did the women do? A. They hung on me and they were choking me down. They had their arms
160 around my neck, and about that time they began screaming.

Q. Then what did you do? A. Well, I slapped them a little with the barrel of the gun to get them loose from me.

I said, "Let me go," and I was choked down, with their arms around my neck, and they wouldn't let go, and I hit them each one with a tap or two of the gun, three or four maybe. I wouldn't say how many.

Q. Is that when their head was cut? A. That is when their head was cut.

Q. Now, do you know where those bullets went after they were fired? A. They went right into the wall in front of my door, all of them in a space of about 15 inches apart, triangle.

Q. Looking at this back wall here as being the wall across from your door, assuming this to be the door, about how high were the bullet holes? A. About as high as that instrument there (indicating).

Q. About as high as this (indicating)? A. Yes.

Q. And in reference to the space in here, about where were the bullet holes? A. Well, not over fifteen inches across from it.

Q. Would you say here (indicating)? A. Yes, sir. About there.

161 Q. And another one there (indicating)? A. Yes.

Q. And one a little lower? A. Something like that.

Q. They were all in the same direction and right straight across from your door? A. That is right.

Q. Now, at any time were you pinned against the wall with your hand up in the air? A. No.

Q. Did you at any time threaten to shoot the children? A. I did not.

Q. Did you know where the children were at that time? A. No, I did not know where they were, except I knew they were not right around us.

Q. Did you make a threat that you were going to kill all of them? A. No. I never made a threat to kill anybody.

Q. After this occurred, how long was it before the police came up? A. Well, it was quite a period of time. I was amazed at how slow they had got there.

Q. When the police came upstairs, was it Officer Saunders who came up? A. He was; yes.

162 Q. What did he say when he came up? A. Well, he hesitated down at the foot of the stairs. I had already put my gun away, and I had a hole cut in my mat-

tress right under my pillow where I kept it occasionally, and I had already put it away, but I still had the shoulder holster on, and Saunders seemed to hesitate at the foot of the stairs; he seemed to think that he might run into some gunfire himself, or something, and I says, "Come on up," and then he came bounding up with his gun out in his hand and said, "Where is that gun?"

I just went to the head of my bed and gave it to him.

Q. Did you give him the gun? A. I certainly did; yes, sir.

Q. Did you have any conversation with him at that time?

A. No, sir, except I asked him to let me lock up before they took me down.

Q. At the time he came up, where was this particular iron bar? A. Laying on the floor where Sosa dropped it.

Q. Laying where? A. Laying on the floor about, I would say, eight or nine feet from my room door, laying in the hall.

Q. In the hall? A. Maybe not that far away.

Q. Did you tell him at that time that you had been
163 attacked with that? A. I told him, yes, sir, and I brought it to him. I brought it out of the hall.

He told me, he saw me pick it up.

Q. Beg pardon? A. He saw where I picked it up at.

Q. Now, you heard him testify about what you said to him? A. Yes, I heard it.

Q. In reference to having shot Mr. Sosa, and you hoped you had killed him? A. Yes, sir; I heard that.

Q. Was any such conversation had? A. There was not.

Q. Did you ever make such a statement? A. I never heard a police officer tell so many lies.

The Court: Just answer the questions.

By Mr. Lindas:

Q. Did you ever make such a statement? A. No, I did not.

Mr. Lindas: That is all, your Honor.

* * * * *

Charge to the Jury.

The Court (Tamm, J.): Ladies and gentlemen of the jury, the submission of evidence having been completed, counsel having completed their arguments to you, it now becomes the Court's responsibility to instruct you as to the law that will govern you in reaching your verdict in this case, and it is your duty to accept the law in the case as it is outlined to you by the Court.

The indictment in this case consists of three counts.

The first count charges that the defendant, on or about July 2, 1949, made an assault on Joseph M. Sosa with a dangerous weapon, that is to say, a loaded pistol.

The second count charges that on July 2, the defendant made an assault on Mary K. Sosa, with a dangerous weapon, that is to say, a pistol used as a club.

The third count of the indictment charges that the defendant on July 2, made an assault on Sarah J. Hawkins, with a dangerous weapon, that is to say, a pistol used as a club.

The indictment is returned under that section of the District of Columbia Code which very simply says that any person who commits an assault with a dangerous weapon shall be guilty of a crime.

245 An assault consists in an unlawful offer or attempt with force or violence to do bodily harm to another.

A dangerous weapon is any weapon which is capable of inflicting serious injury.

I have told you before that the test of whether a weapon is a dangerous weapon is the injury actually inflicted by it.

When you go to the jury room, you will take with you a copy of this indictment. The indictment is not evidence against the defendant. It has no probative value. You should not consider it as any testimony against the defendant. The sole purpose of the indictment is to advise the defendant of the charges which have been made against him, and of the charges which he must answer in this trial.

You must not consider the indictment as being evidence against the defendant.

The burden of proof in this case, of course, as in all cases, is upon the Government to prove by competent evidence beyond a reasonable doubt every material fact necessary for a conviction.

The defendant is not required to prove his innocence. The Government is required to prove his guilt.

I instruct you that the law presumes the innocence of every person accused of a crime, including this defendant. Before a conviction for any offense is justified, the Government must prove against the defendant each and
 246 every element of the offense charged and prove that offense and each element of it beyond a reasonable doubt.

A reasonable doubt is a doubt for which you can give a reason to yourselves; a doubt based on reason, not on conjecture, on prejudice, on emotion, or on guess.

A reasonable doubt is that type of doubt which is, as I say, based on reason. If after an impartial and fair comparison and consideration of all of the evidence in the case, you can say to yourselves that you are not convinced of the defendant's guilt, then you have a reasonable doubt and should find the defendant not guilty.

If, on the other hand, after a fair and impartial comparison and consideration of all of the evidence in the case, you can truthfully say to yourselves that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters in your own affairs, then you have no reasonable doubt.

You are the sole and exclusive judges of the facts. You, and you alone, are the judges of the credibility of the witnesses, and you must determine which witnesses to believe and to what extent to believe them.

In weighing the credibility of these witnesses, you have the right to consider their demeanor upon the witness stand; their manner of testifying; their apparent candor

and fairness, or lack of it; the interest which they
 247 may have in the result of the trial, or their lack of
 interest in the result of the trial; their bias and
 prejudice against the defendant, or their bias and prejudice
 for the defendant, if any has been shown; their opportunity
 of knowing the facts and circumstances to which they have
 testified, and any and all other factors which will guide you
 in determining whether the witnesses are telling the truth
 or telling a falsehood.

If you find that any witness willfully testified falsely as
 to any material fact concerning which that witness could
 not possibly be mistaken, then you are at liberty, if you
 deem it wise to do so, to disregard the entire testimony of
 that witness or any part of the testimony of that witness.

You are instructed that you must, under your oaths as
 jurors, try this case solely and entirely upon the evidence
 introduced herein, and the law as given to you by the Court.

You are instructed to disregard all statements of counsel
 on both sides unless those statements are supported by the
 testimony.

You are not to draw any conclusions or any inferences
 from questions propounded by counsel and ruled out by the
 Court, or from offers of testimony which have been rejected
 by the Court, or any testimony which the Court has stricken
 should not be considered by you as evidence.

You are further instructed that while the law of the Dis-
 trict of Columbia makes the defendant a competent
 248 witness in this case, yet you have the right to take
 into consideration his situation and interest in the
 result of your verdict, and all of the circumstances which
 surround him to give to his testimony only such weight as
 it is fairly entitled to in your judgment.

The defendant claims in this case that he acted in self-
 defense. The law recognizes such a defense. Self-defense
 is a law of necessity. Every human being has a right to
 defend himself against death or against serious bodily
 harm. Self-preservation is the law of all nature. What,
 then, is sufficient to constitute self-defense?

If the defendant was so circumscribed or so situated that he honestly believed, that he had a reasonable ground for such belief, that he could not save himself from serious bodily harm except by shooting and beating the complaining witnesses, then he had a right to so protect himself.

Justification by way of self-defense requires that the one complaining such justification shall, without fault on his part, be placed in imminent danger of an assault, or that he must honestly believe that such danger is present, under circumstances which would justify a reasonable man in so believing, and that the only way in which he can avoid that danger is by repelling force by force.

In order to justify the defense of self-defense, there must be an honest and reasonable belief of imminent
249 death or grievous bodily harm at the hands of the assailant or assailants which can be avoided by the defendant only by assaulting those assailants.

Self-defense from a danger means a present danger of immediate grave injury to the person, which might maim him or that would be permanent in character, or which might produce death.

Self-defense depends upon a violent assault made by another, without fault of the defendant, and if the defendant was himself the aggressor and brought on the difficulty, he cannot rely on this form of justification.

What constitutes a sufficient danger to warrant a bona fide belief of apparent imminent danger is a question of fact in this case to be answered objectively in terms of an honest belief of such danger upon the part of a reasonable man under the same circumstances.

All of the circumstances surrounding the assault should be considered by you.

Testimony has been given touching the good character of the defendant. When a man is charged with crime, the courts permit this question of good character to be introduced, upon this theory: if a man in the community where he lives has built up in the years of his life a character

among his associates for peacefulness and good order, and honesty and integrity, it is right that jury should
 250 know that fact. Because of the generally accepted proposition that one of good reputation is less likely to commit a crime than one of bad reputation, the testimony of character witnesses is a fact to be considered by you, the members of the jury, together with all the other facts and circumstances of the case, in reaching the ultimate conclusion of guilt or innocence, and if such evidence, together with the other facts and circumstances proved, raises a reasonable doubt as to guilt, your verdict should be not guilty.

But, if upon the whole evidence, including that of good character, you are satisfied beyond a reasonable doubt of the defendant's guilt, it is your duty to return a verdict of not guilty.

If you can reconcile the evidence in this case with any reasonable hypothesis consistent with the innocence of the defendant, you should do so, and in that case your verdict should be not guilty.

Testimony of the Government's witnesses, and the defendant, as to the details of the affray of July 2, vary not only as to what happened but as to the chronological order of the rapidly moving events.

A question of law arises from the evidence as to whether Mr. Sosa, Mrs. Sosa, and Mrs. Hawkins, had any special legal status as to each other, or as to the defendant in the altercation because of their relationship to each other; that is, as husband, as wife, and as sister-in-law.

251 The law is that one may do in defense of another what the other may do in defense of himself. A bystander may interfere to prevent an assault or any other crime, but the right to defend another is not greater than the latter's right to defend himself.

The law is, further, that a person has only the same right to act in defense of persons who stand in a family relation as he has to act in defense of any other person.

In other words, the relationship between Joe Sosa, Mrs. Sosa, and Mrs. Hawkins, does not confer upon them any special legal status, rights, or privileges, in this affray merely because of this relationship.

If you, the members of the jury, find that the gun in the hands of the defendant was discharged accidentally while the defendant and the complaining witnesses were wrestling in an affray which was not deliberately initiated and provoked by the defendant, and that the defendant had no intention of firing the gun, you must find that a necessary element of the charge of assault with a dangerous weapon is lacking and in that case, of course, your verdict should be not guilty.

It is necessary that all twelve of you should agree in order to return a verdict.

The indictment charges the defendant in three counts.

You should find the defendant either guilty or not
252 guilty on the first count; guilty or not guilty on the second count; guilty or not guilty on the third count.

Will counsel approach the bench?

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court. Does the Government request any further charge?

Mr. Bacon. No, your Honor. The Government is content.

The Court. Are there any exceptions to the charge as given?

Mr. Bacon. No, your Honor.

The Court. Does the defendant request any further charge?

Mr. Ford. I only submit this for the Court's consideration: In the Government's argument to the jury, they alleged that the Sosas possessed a legal right in this fashion, that he said that Sosa had a legal right not to pay any rent until the Rent Commission had passed upon it. I know of no such law as that at all.

The Court. The Court has advised the jury that the statements of counsel are not binding on them.

Reverting to my statement yesterday, I think that if I pick out any one item of specific testimony to comment on, I put too much attention to it.

253 Mr. Ford. Correct. I merely had in mind, your Honor, that he had brought it out in his closing, establishing a legal right. Other than that, I have no exception to your Honor's charge at all.

The Court. Very well. The Court feels that the argument of counsel is not evidence to be considered by the jury.

Any other exception?

Mr. Ford. No, your Honor.

The Court. Very well.

* * * * *

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Filed Jan 11 1950

Judgment and Commitment.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA DIVISION

Criminal No. 1143-49

UNITED STATES OF AMERICA

v.

WILLIAM R. MACILRATH

On this 6th day of January, 1950 came the attorney for the government and the defendant appeared in person and by counsel, Ben Lindas, Esquire and Charles E. Ford, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Assault with a Dangerous Weapon, as charged,

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is ADJUDGED that the defendant is guilty as charged and convicted.

It is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Years to Nine (9) Years on the First Count of the indictment; One (1) Year to Three (3) Years on the Second Count of the indictment to take effect at the expiration of sentence imposed on the First Count of the indictment; One (1) Year to Three (3) Years on the Third Count of the indictment to run concurrently with sentence imposed on the Second Count of the indictment.

It is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EDWARD A. TAMM,

United States District Judge.

* * * * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,508

WILLIAM R. MACILRATH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

GEORGE MORRIS FAY,
United States Attorney.

**HAROLD H. BACON,
JOSEPH M. HOWARD,
JOSEPH F. GOETTEN,**
Assistant United States Attorneys.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JAN 30 1951

Joseph W. Stewart

CLERK

QUESTION PRESENTED

The sole question presented is whether an instruction on simple assault, which was not requested, was nevertheless required under the following circumstances: Appellant was charged with, and convicted of, having made three assaults with a dangerous weapon—one upon Joseph M. Sosa with a loaded pistol, and two upon Mary K. Sosa and Sara J. Hawkins with a pistol used as a club. It was not disputed that appellant shot Mr. Sosa in the chest with a pistol or that he hit Mrs. Sosa and Mrs. Hawkins on their heads with the pistol. All three victims were taken to the hospital for treatment. After the violence, one of the women was seen lying on the sidewalk with blood all over her head and clothes. One of the women in cross-examination exhibited the stitches which had been taken on the side of her head where she had been struck. (Equal, concurrent sentences were imposed with respect to the assaults upon the two women.)

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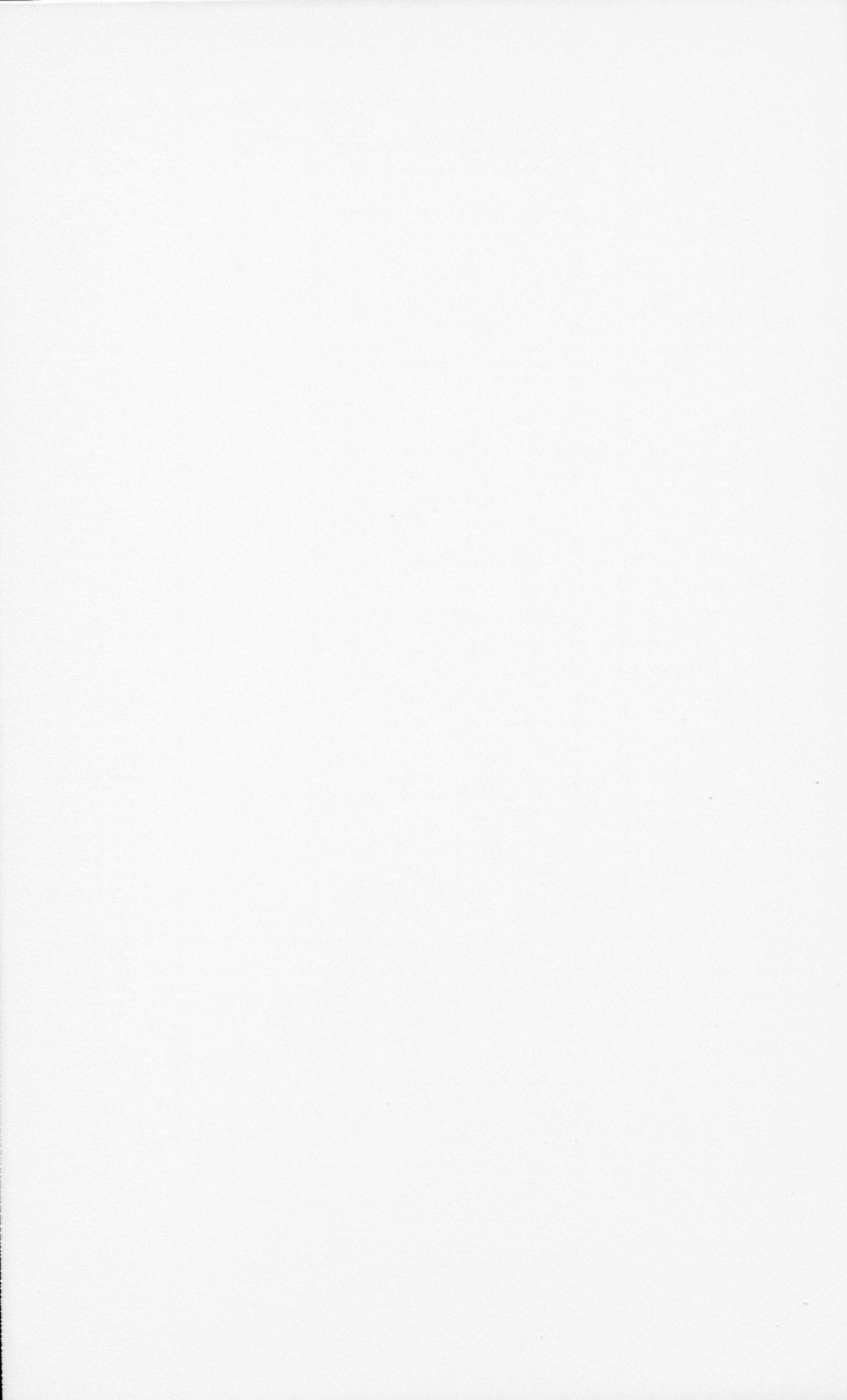
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,508

WILLIAM R. MACILRATH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a three-count indictment filed in the District Court William R. MacIlrath was charged with having on July 2, 1949, within the District of Columbia committed three assaults with a dangerous weapon. In Count 1 he was charged with having made an assault upon Joseph M. Sosa with a loaded pistol; in Counts 2 and 3 he was charged with having made assaults upon Mary K. Sosa and Sara J. Hawkins, respectively, with a pistol used as a club. (J.A. 4.) Upon arraignment, the defendant MacIlrath pleaded not guilty. He was tried by jury and found guilty as charged. His motion for a new trial was denied and judgment of conviction was entered sentencing him to imprisonment for a term of 3 to 9 years on Count 1, 1 to 3 years on Count 2, and 1 to 3 years on Count 3—the sentences on Counts 1 and 2 to run consecutively and the sentences on

Counts 2 and 3 to run concurrently. (J.A. 2.) He now appeals.

Undisputed evidence showed that the acts upon which the charges in the indictment were based took place in the hallway on the second floor of premises located at 460-A H Street, S.W., Washington, D.C.; that Mr. (Joseph M.) and Mrs. (Mary K.) Sosa, assisted by Mrs. Sosa's sister, Sara J. Hawkins, were in the process of loading their possessions on a truck in order to move away from that address; that appellant occupied the second floor of the premises at that address and had sub-let a portion of that floor to Mr. and Mrs. Sosa; that Mr. Sosa had filed a complaint with the Office of Rent Control with respect to the amount of rent appellant was charging him and had not paid appellant rent for the preceding six weeks.

According to Mr. and Mrs. Sosa and Mrs. Hawkins the violence occurred as follows. While Mr. Sosa and Mrs. Hawkins were gathering up the Sosa family belongings in the two rooms which the Sosas had been occupying, appellant encountered Mrs. Sosa in the hallway, drew his pistol from under his shirt (where he was wearing a shoulder holster) and pointed it at her (J.A. 7-8; R. 62-63). She screamed, "Not with a gun, Mac, not with a gun" and attempted to grab the pistol. As Mr. Sosa and Mrs. Hawkins rushed into the hallway, appellant struck Mrs. Sosa on the head with the gun. (J.A. 5-6; R. 62-63.) Mr. Sosa and Mrs. Hawkins saw blood coming from Mrs. Sosa's head (J.A. 6; R. 92). Appellant then pointed his gun at Mr. Sosa and, exclaiming, "I am going to fix him for good" (R. 64), fired two shots, the second of which hit Mr. Sosa in the chest. Mrs. Hawkins told Mr. Sosa to leave and attempted to restrain appellant. Mr. Sosa went downstairs and heard a third shot fired as he was going. (J.A. 6-7.) Appellant then struck Mrs. Hawkins on the head six times with his gun (R. 65). Mrs. Hawkins told Mrs. Sosa to leave (R. 66). Appellant remarked, "She ain't going any place, and neither are you * * * I am going to get every one of you sooner or later" (R. 66-67). Mrs. Sosa got half

way down the steps and then remembered her babies upstairs. She started back and told appellant, who was then at the head of the stairs, "I am going back after my babies." Appellant replied, "Huh, I am going to take care of them. I am going to kill every one of them." Then appellant again struck Mrs. Sosa on the head with his gun when she attempted to get past him. (R. 66.) (Mrs. Sosa's babies were not actually molested.)

Appellant did not deny that he shot Mr. Sosa and admitted that he hit Mrs. Sosa and Mrs. Hawkins on the head with his pistol several times as a result of which their heads were cut (R. 160). His defense was self-defense and he also claimed that the gun was accidentally discharged.

Officer Richard E. Saunders testified that when he approached appellant after the incident appellant declared that "he had shot the son-of-a-bitch, he hoped he killed him, and if he didn't, he would" (R. 114). Officer Robert E. Campbell corroborated this testimony.

Officer Saunders further testified that when he got to the scene prior to the arrival of the ambulance he saw the man that got shot lying on the sidewalk and one of the women lying on the sidewalk with blood all over her head and all over her clothes (R. 113). Both Mrs. Sosa and Mrs. Hawkins, as well as Mr. Sosa, were taken to the hospital for treatment (R. 66; 94-95). On cross-examination Mrs. Sosa exhibited the stitches which had been taken on the side of her head where she was struck by appellant (R. 87).

Before charging the jury, the court discussed proposed instructions with counsel (R. 193). No instruction on any lesser offense necessarily included in the offense charge was requested or given. The jury was instructed at length (J. A. 20-25) and at the conclusion of the court's charge appellant's counsel expressed satisfaction with the instructions given (J. A. 26). On his motion for a new trial appellant did not complain of the omission of an instruction on simple assault.

STATUTE AND RULES INVOLVED

D. C. Code (1940), § 22-502 provides:

Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 804.)

Rule 30, Federal Rules of Criminal Procedure, provides:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 31 (c), Federal Rules of Criminal Procedure, provides:

The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

SUMMARY OF ARGUMENT

In a trial on a charge of aggravated assault, an instruction on a lesser offense necessarily included in the offense charged is required only where it is both requested by the defendant and justified by the evidence. Where the jury is fully and correctly instructed with respect to all of the essential elements of the greater offense of which the defendant is convicted, an instruction on the lesser, included offense, even though it may be justified by the evidence,

is merely appropriate and not essential. Accordingly, such instruction must be requested in accordance with Rule 30 of the Federal Rules of Criminal Procedure. In his brief appellant concedes that he did not request an instruction on simple assault. He does not challenge the adequacy of the instructions given with respect to the greater offense of which he was convicted.

In a trial on a charge of assault with a dangerous weapon, where the evidence does not justify an instruction on simple assault, such instruction should not be given. In this case the indictment charged that the three assaults were committed with a loaded pistol and a pistol used as a club. Appellant did not deny that he shot one of the victims with a loaded pistol, and admitted that he repeatedly hit the other two victims on their heads with the pistol. Accordingly, an instruction on simple assault would have been appropriate only if the pistol as so used might not have been a dangerous weapon. On the basis of the uncontradicted evidence in this case, the effects of the pistol as used by appellant established that it was unquestionably a dangerous weapon. The evidence showed that all three of the victims were taken to the hospital for treatment. The male victim was shot in the chest. After the violence occurred, one of the two female victims was seen lying on the sidewalk with blood all over her head and all over her clothes. On cross-examination, one of the female victims exhibited the stitches which had been taken on the side of her head where appellant had struck her with the pistol. (Appellant received equal, concurrent sentences on his convictions of assaulting the two female victims with a pistol used as a club. Accordingly, in showing that the pistol used as a club was a dangerous weapon, it is sufficient to demonstrate the extent of the injuries suffered by only one of the two female victims.)

ARGUMENT

I

In a Trial on a Charge of Aggravated Assault, an Instruction on a Lesser Offense Necessarily Included in the Offense Charged Is Required Only Where It Is Both Requested by the Defendant and Justified by the Evidence

Appellant was charged with having violated 22 D. C. Code (1940 ed.) 502 by committing three assaults with a dangerous weapon, one with a loaded pistol and two with a pistol used as a club. Rule 31 (c) of the Federal Rules of Criminal Procedure provides:

Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Citing D. C. Code (1940), § 22-503, relating to assaults with intent to commit another offense, and § 22-504 relating to simple assaults (Br. 4), appellant contends (Br. 6) that the trial court committed fatal error in not instructing the jury on the lesser offenses necessarily included in an assault with a dangerous weapon. Of course, those aggravated assaults covered by § 22-503, in which a specific intent to commit another offense is essential, are not offenses necessarily included in an assault with a dangerous weapon. We shall, therefore, limit our discussion to the omission of an instruction on the included offense of simple assault.

It is well settled that in a trial on a charge of aggravated assault an instruction on a lesser offense necessarily included in the offense charged, even though it may be justified by the evidence, is not required if it is not requested. *People v. Hite*, 135 Cal. 76, 67 Pac. 57, 58-59; *Rawlins v. State*, 40 Fla. 155, 24 So. 65; *People v. Raheer*, 92 Mich. 165, 52 N.W. 625, 625-626; *State v. Urspruch*, 191 Mo. 43, 90 S.W. 451, 453; *State v. Nickens*, 122 Mo. 607, 27 S.W. 339, 340; *Territory v. Gonzales*, 14 N.M. 31, 89 Pac. 250, 252; *State v. Sutterfield*, 22 S.D. 584, 119 N.W. 548, 549; *State v. Hanlon*, 62 Vt. 334, 19 Atl. 773, 774-775. It follows,

therefore, that in a trial on a charge of aggravated assault an instruction on a lesser offense necessarily included in the offense charged, even though justified by the evidence, is properly classified as merely appropriate and not as essential. Cf. *United States v. Newman*, 143 F. 2d 389 (C.A. 2, 1944); *Stassi v. United States*, 50 F. 2d 526 (C. A. 8, 1931). Accordingly, such instruction must be requested in accordance with Rule 30 of the Federal Rules of Criminal Procedure,¹ and its omission, if not so requested, is not reversible error. Of course, where the defendant is convicted of the greater offense charged, it is necessary that the jury have been fully and correctly instructed with respect to all the essential elements of the greater offense. However, where the defendant is represented by able and experienced counsel, it would be unfair to allow him to gamble on a verdict of not guilty by remaining silent with respect to an instruction on the lesser, included offense,

¹ Rule 30 of the Federal Rules of Criminal Procedure provides:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.* Opportunity shall be given to make the objection out of the hearing of the jury. (Emphasis added.)

This Court has stated the reason for the rule as follows:

The requirement [of stating an objection to the charge or omission therefrom and the ground for such objection] is for the sound and practical purpose of affording the court an opportunity to make any additions or corrections that may be deemed appropriate before the jury retires to consider of its verdict. . . . A failure to make objections to the charge deprives a judge of the final opportunity for consideration and action which may avoid serious error resulting in a futile trial. So, in fairness to the court, the parties, and the administration of justice itself, there should be compliance with the rule. *Villaroman v. United States*, — U.S. App. D.C. —, 184 F. 2d 261, 262-263.

and then after conviction of the greater offense, to complain that omission of the unrequested instruction was reversible error. Cf. *People v. Hite, supra*; *State v. Sutterfield, supra*.

It is also well settled, as this Court has held in *Burcham v. United States*, 82 U.S. App. D.C. 283, 163 F. 2d 761, that in a trial on a charge of assault with a dangerous weapon a requested instruction on simple assault should not be given unless there is evidence to justify it. See also *Sparf and Hansen v. United States*, 156 U.S. 51; *Wallace v. United States*, 162 U. S. 466. In the *Burcham* case at p. 762 this Court stated:

While it is true, as appellant asserts, that a defendant may be found guilty of any offense necessarily included in the crime charged in the indictment, Title 18, sec. 565, U.S.C.A., it is also true that an instruction on a lesser included offense should not be given unless there is evidence to justify it. Here the testimony was of an assault with a dangerous weapon, which Burcham did not deny. There was no basis for an instruction on simple assault.²

II

In Appellant's Trial on a Charge of Assault With a Dangerous Weapon, an Instruction on Simple Assault Was Neither Requested by Appellant Nor Justified by the Evidence

Assuming *arguendo* that the evidence in this case justified an instruction on simple assault, nevertheless, such instruction was not requested by appellant. Thus, as appellant now admits (Br. 6):

It is conceded that no request was made of the trial court to instruct on other degrees of the offense or offenses included within the offense charged.

Appellant was represented below by able and experienced counsel; proposed instructions were discussed by the court

² Of course, Rule 31 (c) of the Federal Rules of Criminal Procedure is merely a restatement of the prior 18 U.S.C. 565. Reviser's Notes, Rule 31 (c), Federal Rules of Criminal Procedure. The same principle also has long been applied in state courts.

and counsel prior to the court's charge to the jury; and appellant's counsel at the close of the charge expressed his satisfaction with the instructions given. The adequacy of the instructions given with respect to the essential elements of the offense of which appellant was actually convicted is not challenged.

As previously mentioned, appellant was charged with three assaults with a dangerous weapon, one with a loaded pistol and two with a pistol used as a club. In *Patterson v. Pillans*, 43 App. D.C. 505, 506-507, and *Tatum v. United States*, 71 App. D. C. 393, 110 F. 2d 555, 556, this Court has defined an assault and a dangerous weapon, respectively, as follows:

"An assault is defined by these [authorities], to be an attempt with force or violence to do a corporal injury to another, and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person."

"A dangerous weapon is one likely to produce death or great bodily injury." . . . The weapon need not meet both alternatives . . . an assault with a dangerous weapon need not be an assault with a deadly weapon.

In *Hopkins v. United States*, 4 App. D.C. 430, 442, with respect to the weapon used this Court has also stated:

Whether it was a deadly missile weapon or not would depend largely upon the force with which it was thrown, and the part of the body receiving the blow. The best evidence of its dangerous character, and of what it was capable of doing, was the injury actually inflicted by it.

The evidence in this case did not justify an instruction on simple assault. Claiming that he acted in self-defense and that the gun was accidentally discharged,³ appellant did not

³ Of course, these claims, if believed, would be just as valid defenses with respect to simple assault as with respect to assault with a dangerous weapon. The adequacy of the instructions dealing with these defenses is not questioned.

deny that he shot Mr. Sosa in the chest with a pistol. He admitted that he repeatedly hit Mrs. Sosa and Mrs. Hawkins on the head with the pistol and that as a result their heads were cut. Whether the evidence justified an instruction on simple assault, therefore, turns solely upon the question whether the pistol so used was a dangerous weapon. In this case it is unnecessary to speculate whether the pistol used as a club was capable of producing serious bodily injury since we have concrete evidence of its actual effect so used. The evidence, as previously summarized, showed that the three victims were taken to the hospital for treatment. Officer Saunders testified that when he got to the scene prior to the arrival of the ambulance he saw one of the women lying on the sidewalk with blood all over her head and all over her clothes. Mrs. Sosa exhibited the stitches which had been taken on the side of her head where appellant had struck her with the pistol.⁴ Obviously, a pistol so used as a club was a dangerous weapon.⁵ Thus, as the Court of Appeals for the Ninth Circuit in a very similar

⁴ It is well settled that, where a defendant is convicted on more than one count of an indictment and the sentences are to run concurrently, if the conviction on one count is sufficient to sustain the sentence, it is unnecessary to consider questions raised with respect to other counts. *Hirabayashi v. United States*, 320 U.S. 81, 85, 105; *Meyers v. United States*, 84 U.S. App. D.C. 101, 171 F. 2d 800, 803, cert. den. 336 U.S. 912. Appellant received equal, concurrent sentences on Counts 2 and 3, relating to his assaults upon Mrs. Sosa and Mrs. Hawkins, and such sentences are within the maximum prescribed by D. C. Code (1940), § 22-502. Accordingly, in showing that the pistol as used was a dangerous weapon, it is sufficient to demonstrate the extent of the injuries suffered by only one of the two women assaulted.

⁵ While the court in the case at bar did instruct the jury as to what constitutes a dangerous weapon, it is believed that on the basis of the evidence this was entirely unnecessary. The court could have ruled as a matter of law that the pistol as used was a dangerous weapon, and appellant was not entitled to have the matter submitted to the jury. *Hickey v. United States*, 168 F. 2d 536, 538 (C.A. 9, 1900); cf. *Burcham v. United States*, *supra*. By its verdict the jury implicitly found that the pistol as used was a dangerous weapon, and it is clear that the jury could not properly have reached any other conclusion. Accordingly, the fact that the matter was submitted to the jury is immaterial.

case has stated with respect to a pistol used as a club to strike the victim's head:

There is not the slightest doubt that he assaulted Powell with a revolver, using it as a club. Indeed, he admits this himself. *That such an instrument, so used, is a dangerous weapon, no one will question.* So that, the assault being established, there was but one defense, namely, that the defendant was justifiable in making it. If justifiable, he was not guilty; but, whether guilty or not guilty was a question for the jury. There was no room, therefore, for the jury to find the defendant guilty of a lesser offense than assault with a dangerous weapon, and the court rightly refused to submit the question to them. (Emphasis added) *Hickey v. United States*, 168 F. 2d 536, 538 (C.A. 9, 1900).

A fortiori, a loaded pistol used to shoot the victim is also a dangerous weapon. The only assaults charged in the instant case were those committed with the pistol. Since the pistol as used under the circumstances was unquestionably a dangerous weapon, the trial court properly instructed the jury that with respect to each count of the indictment their verdict should be either guilty as charged or not guilty.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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